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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1344

MICHAEL M.,

Petitioner,

vs.

THE SUPERIOR COURT OF SONOMA COUNTY, THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

BRIEF OF RESPONDENT IN OPPOSITION

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SUBJECT INDEX

	Page
Question Presented	1
Statement of the Case	1
Argument	3
California Penal Code Section 261.5 Does Not Contain an Impermissible Classification Based on Gender	3
Conclusion	6

TABLE OF AUTHORITIES CITED

Cases

Craig v. Boren (1976) 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 5
Groves, Ex Parte (Tex. 1978) 571 S.W.2d 888 3
J.D.G., In re Interest of (Mo. 1973) 498 S.W.2d 786 ..... 3, 5
Meloon v. Helgemoe (1st Cir. 1977) 564 F.2d 602, cert. den., 436 U.S. 950, 56 L.Ed.2d 793, 98 S.Ct. 2858 3
Michael M. v. Superior Court (Cal. 1979) 25 Cal.3d 608, 601 P.2d 571 ..... 3, 4
Olson v. Nevada (1979) 588 P.2d 1018 ..... 3, 5
Orr v. Orr (1979) 440 U.S. 268, 59 L.Ed.2d 306, 99 S.Ct. 1102 5
People v. Fauntleroy (N.Y. 1978) 405 N.Y.S.2d 931 3
People v. Salinas (Colo. 1976) 551 P.2d 703 3
Reitman v. Mulkey (1967) 387 U.S. 369, 18 L.Ed.2d 830, 87 S.Ct. 1627 4
Rundlett v. Oliver (1st Cir. 1979) 607 F.2d 495 3
Sail'er Inn v. Kirby (Cal. 1971) 5 Cal.3d 1, 485 P.2d 529 4
State v. Drake (Iowa 1974) 219 N.W.2d 492 3
State v. Meloon (N.H. 1976) 366 A.2d 1176 ..... 3, 5
State v. Rundlett (Maine 1978) 391 A.2d 815 ..... 3, 5

Statutes

California Constitution, Art I, Sec. 7(a) 4
California Penal Code, Sec. 261.5 ..... 1, 2, 3, 4, 5, 6
California Penal Code, Sec. 272 5

Page

California Penal Code, Sec. 288 5

California Penal Code, Sec. 647a 5

United States Constitution, Fourteenth Amendment 1, 3, 4, 5

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THE SUPERIOR COURT OF SONOMA COUNTY, THE PEOPLE OF THE STATE OF CALIFORNIA,

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BRIEF OF RESPONDENT IN OPPOSITION

Question Presented

Whether section 261.5 of the Penal Code of the State of California, defining the offense of unlawful sexual intercourse (formerly statutory rape), violates equal protection of the law under the Fourteenth Amendment of the United States Constitution on the ground that the statute contains an impermissible classification based upon gender.

Statement of the Case

Petitioner was charged in a one count information filed on June 27, 1978, by the District Attorney of Sonoma County with unlawful sexual intercourse, in violation of California Penal Code section 261.5. Petitioner's motion to dismiss the information on the ground that Penal Code

section 261.5 violates equal protection of the law under the California and United States Constitutions was denied.

Petitioner's application to the California Court of Appeal, First Appellate District, for a Writ of Prohibition to restrain proceedings was denied without comment on September 14, 1978. On October 12, 1978, the California Supreme Court issued an Alternative Writ of Mandate ordering Respondent Sonoma County Superior Court to show cause why the information should not be dismissed. Following oral argument, the California Supreme Court found a compelling state interest to support Penal Code section 261.5 and denied the Writ of Mandate on November 5, 1979. A petition for rehearing was denied on December 5, 1979.

ARGUMENT

California Penal Code Section 261.5 Does Not Contain an Impermissible Classification Based on Gender.

Petitioner argues that California Penal Code section 261.5 violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because it contains a gender-based classification of both defendants and victims. (Petn., pp. 6-10.) Petitioner's contention was rejected by the California Supreme Court, which found pregnancy prevention to be the purpose of Penal Code section 261.5[1] and determined that the classification promoted a compelling state interest.

The question of the validity of the statutory rape provisions of the various states has been the recent subject of numerous cases, although this Court has yet to address the issue. The overwhelming weight of authority, including the instant case, has upheld the statutes in question in the face of equal protection challenges.[2] The sole exception to the majority of cases is the First Circuit's opinion in *Meloon v. Helgemoe* (1st Cir. 1977) 564 F.2d 602, cert. den., 436 U.S. 950, 56 L.Ed.2d 793, 98 S.Ct. 2858, which struck down New Hampshire's former statutory rape provision.

The California Supreme Court found that Penal Code section 261.5 does contain a classification scheme based on

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[1]Penal Code section 261.5 provides that "[u]nlawful sexual intercourse is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years."

[2]*Michael M. v. Superior Court* (Cal. 1979) 25 Cal.3d 608, 601 P.2d 571; *Rundlett v. Oliver* (1st Cir. 1979) 607 F.2d 495; *Olson v. Nevada* (1979) 588 P.2d 1018; *State v. Rundlett* (Maine 1978) 391 A.2d 815; *Ex Parte Groves* (Tex. 1978) 571 S.W.2d 888; *People v. Fauntleroy* (N.Y. 1978) 405 N.Y.S.2d 931; *People v. Salinas* (Colo. 1976) 551 P.2d 703; *State v. Meloon* (N.H. 1976) 366 A.2d 1176; *State v. Drake* (Iowa 1974) 219 N.W.2d 492; *In re Interest of J.D.G.* (Mo. 1973) 498 S.W.2d 786.

gender because "only females may be victims, and only males may violate the sections." (*Michael M. v. Superior Court, supra*, at p. 611.) The court upheld this classification scheme after determining that the statutory purpose was to prevent pregnancy in females below the age of 18, and finding that pregnancy prevention constituted a compelling state interest. (*Michael M. v. Superior Court, supra*, at pp. 611-613.) In support of its conclusions, the court relied heavily on statistics revealing the large numbers of children born to unwed teenagers below the age of 18, the disproportionate use of abortion services by teenagers and the very real physical and social harm which frequently accompanies such pregnancies. (*Michael M. v. Superior Court, supra*, at pp. 611-612.)

It is clear, therefore, that the California Supreme Court carefully examined the legislative purpose behind Penal Code section 261.5 in determining its constitutionality. It is well settled that state courts are the ultimate expositors of state law, and where it is necessary to determine what objectives are sought to be served by a statute, the views of the highest state court should be given careful consideration. (*Reitman v. Mulkey* (1967) 387 U.S. 369, 376-379, 18 L.Ed.2d 830, 87 S.Ct. 1627.) Respondent submits that the thoughtful analysis of the California Supreme Court is amply supported by the data upon which it relied, and that determination should be respected by this Court.

The constitutionality of Penal Code section 261.5 was judged by the California Supreme Court under the "strict scrutiny" equal protection test applicable under article I, section 7, subdivision (a) of the California Constitution. (See *Sail'er Inn v. Kirby* (Cal. 1971) 5 Cal.3d 1, 485 P.2d 529.) Under the Equal Protection Clause of the Fourteenth Amendment, upon which petitioner relies in the instant petition, a classification based upon gender withstands scrutiny

if it serves important governmental objectives and is substantially related to those objectives. (*Orr v. Orr* (1979) 440 U.S. 268, 279, 59 L.Ed.2d 306, 99 S.Ct. 1102; *Craig v. Boren* (1976) 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397.) In view of the heightened scrutiny given Penal Code section 261.5 by the California Supreme Court, the constitutionality of the statute under the less rigorous standard of the Fourteenth Amendment is manifest.

That the prevention of pregnancy in unwed women under the age of 18 is an important governmental interest is not seriously disputed by petitioner. Indeed, pregnancy prevention has been recognized as an important governmental objective in several cases. (*Olson v. Nevada, supra*, 588 P.2d at p. 1019; *State v. Rundlett, supra*, at pp. 818-822; *State v. Meloon, supra*, 366 A.2d at p. 1177; *In re Interest of J.D.G., supra*, 498 S.W.2d at pp. 792-793.) Certainly there can be little doubt that Penal Code section 261.5 is substantially related to the objective of pregnancy prevention since it prohibits the very act necessary to conception. Penal Code section 261.5 clearly withstands petitioner's challenge under the Equal Protection Clause of the Fourteenth Amendment.

Finally, respondent points out that in addition to the objective of pregnancy prevention, Penal Code section 261.5 is part of the larger governmental objective of prohibiting sexual abuse of all minors in California. (See, *e.g.*, Cal. Pen. Code, § 272 (contributing to the delinquency of a minor); Cal. Pen. Code, § 288 (lewd and lascivious conduct on the body of a child under the age of 14); and § 647a (annoying or molesting any child under the age of 18).) Penal Code section 261.5 is merely part of a comprehensive legislative scheme against sexual abuse of minors of both sexes by perpetrators of both sexes. Viewed in conjunction with these pertinent provisions of the California Penal Code,

it is apparent that Penal Code section 261.5 is part of a statutory scheme substantially related to the important governmental interest of prohibiting sexual abuse of minors. Penal Code section 261.5 was properly found by the California Supreme Court below not to violate the Equal Protection Clause of the Fourteenth Amendment.

Conclusion.

For the foregoing reasons, respondent urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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